

(1) The Presiding Officer shall promptly issue any necessary scheduling order for any additional briefing of the issue of summary adjudication on the Application for Review and Response.

(2) The Presiding Officer may conduct scheduling conferences and other proceedings that the Presiding Officer determines to be appropriate.

(b) If the Presiding Officer determines that there is no genuine issue of material fact and that one party or the other is entitled to decision as a matter of law, then the record shall be closed and the Presiding Officer shall issue an Initial Decision on the Application for Review pursuant to § 27.340.

(c) If a Presiding Officer determines that any factual issues require the cross-examination of one or more witnesses or other proceedings at a hearing, the Presiding Officer, in consultation with the parties, shall promptly schedule a hearing to be conducted pursuant to § 27.335.

§ 27.335 Hearing procedures.

(a) Any hearing shall be held as expeditiously as possible at the location most conducive to a prompt presentation of any necessary testimony or other proceedings.

(1) Videoconferencing and teleconferencing may be used where appropriate at the discretion of the Presiding Officer.

(2) Each party offering the affirmative testimony of a witness shall present that testimony by declaration, affidavit, or other sworn statement submitted in advance as ordered by the Presiding Officer.

(3) Any witness presented for further examination shall be asked to testify under an oath or affirmation.

(4) The hearing shall be recorded verbatim.

(b)(1) A facility or other person may appear and be heard on his own behalf or through any counsel of his choice who is qualified to possess CVI.

(2) A facility or other person individually, or through counsel, may offer relevant and material information including written direct testimony which he believes should be considered in opposition to the administrative action

or which may bear on the sanction being sought.

(3) The facility or other person individually, or through counsel, may conduct such cross-examination as may be specifically allowed by the Presiding Officer for a full determination of the facts.

§ 27.340 Completion of adjudication proceedings.

(a) The Presiding Officer shall close and certify the record of the adjudication promptly upon the completion of:

(1) Summary judgment proceedings,

(2) A hearing, if necessary,

(3) The submission of post hearing briefs, if any are ordered by the Presiding Officer, and

(4) The conclusion of oral arguments, if any are permitted by the Presiding Officer.

(b) The Presiding Officer shall issue an Initial Decision based on the certified record, and the decision shall be subject to appeal pursuant to § 27.345.

(c) An Initial Decision shall become a final agency action on the expiration of the time for an Appeal pursuant to § 27.345.

§ 27.345 Appeals.

(a) *Right to Appeal.* A facility or any person who has received an Initial Decision under § 27.340(b) has the right to appeal to the Under Secretary acting as a neutral appeals officer.

(b) *Procedure for Appeals.* (1) The Assistant Secretary, a facility or other person, or a representative on behalf of a facility or person, may institute an Appeal by filing a Notice of Appeal with the office of the Department hereinafter designated by the Secretary.

(2) The Assistant Secretary, a facility, or other person must file a Notice of Appeal within seven calendar days of the service of the Presiding Officer's Initial Decision.

(3) The Appellant shall file with the designated office and simultaneously serve each Notice of Appeal and all subsequent filings on the General Counsel.

(4) An Initial Decision is stayed from the timely filing of a Notice of Appeal until the Under Secretary issues a Final Decision, unless the Secretary

§ 27.400

lifts the stay due to exigent circumstances pursuant to § 27.310(d).

(5) The Appellant shall file and serve a Brief within 28 calendar days of the notification of the service of the Presiding Officer's Initial Decision.

(6) The Appellee shall file and serve its Opposition Brief within 28 calendar days of the service of the Appellant's Brief.

(c) The Under Secretary may provide for an expedited appeal for appropriate matters.

(d) *Ex Parte Communications.* (1) At no time after the filing of a Notice of Appeal pursuant to paragraph (b)(1) of this section and prior to the issuance of a Final Decision on an Appeal pursuant to paragraph (f) of this section with respect to a facility or other person shall the Under Secretary, his designee, or any person who will advise that official in the decision on the matter, discuss *ex parte* the merits of the proceeding with any interested person outside the Department, with any Department official who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

(2) If, after the filing of a Notice of Appeal pursuant to paragraph (b)(1) of this section and prior to the issuance of a Final Decision on an Appeal pursuant to paragraph (f) of this section with respect to a facility or other person, the Under Secretary, his designee, or any person who will advise that official in the decision on the matter, receives from or on behalf of any party, by means of an *ex parte* communication, information which is relevant to the decision of the matter and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to the *ex parte* communication within a time set by the Under Secretary or his designee.

(3) The consideration of classified information or CVI pursuant to an in camera procedure does not constitute a prohibited *ex parte* communication for purposes of this subpart.

(e) A facility or other person may elect to have the Under Secretary participate in any mediation or other res-

6 CFR Ch. I (1–12 Edition)

olution process by expressly waiving, in writing, any argument that such participation has compromised the Appeal process.

(f) The Under Secretary shall issue a Final Decision and serve it upon the parties. A Final Decision made by the Under Secretary constitutes final agency action.

(g) The Secretary may establish procedures for the conduct of Appeals pursuant to this section.

Subpart D—Other

§ 27.400 Chemical-terrorism vulnerability information.

(a) *Applicability.* This section governs the maintenance, safeguarding, and disclosure of information and records that constitute Chemical-terrorism Vulnerability Information (CVI), as defined in § 27.400(b). The Secretary shall administer this section consistent with section 550(c) of the Homeland Security Appropriations Act of 2007, including appropriate sharing with Federal, State and local officials.

(b) *Chemical-terrorism Vulnerability Information.* In accordance with section 550(c) of the Department of Homeland Security Appropriations Act of 2007, the following information, whether transmitted verbally, electronically, or in written form, shall constitute CVI:

(1) Security Vulnerability Assessments under § 27.215;

(2) Site Security Plans under § 27.225;

(3) Documents relating to the Department's review and approval of Security Vulnerability Assessments and Site Security Plans, including Letters of Authorization, Letters of Approval and responses thereto; written notices; and other documents developed pursuant to §§ 27.240 or 27.245;

(4) Alternate Security Programs under § 27.235;

(5) Documents relating to inspection or audits under § 27.250;

(6) Any records required to be created or retained under § 27.255;

(7) Sensitive portions of orders, notices or letters under § 27.300;

(8) Information developed pursuant to §§ 27.200 and 27.205; and

(9) Other information developed for chemical facility security purposes that the Secretary, in his discretion,